No. 89-1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MIKE SEXTON, Individually and as Limited Guardian of the Separate Estate of Julie Sexton, an Incapacitated Person,

Petitioner,

v.

LONE STAR LIFE INSURANCE COMPANY and PACIFIC MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT PACIFIC MUTUAL LIFE INSURANCE COMPANY

STEPHEN F. FINK
Counsel of Record
and
STEVEN W. SLOAN
ELIZABETH A. SCHARTZ

THOMPSON & KNIGHT
3300 First City Center
1700 Pacific Avenue
Dallas, Texas 75201
(214) 969-1700

Attorneys for Respondent
PACIFIC MUTUAL LIFE
INSURANCE COMPANY

QUESTIONS PRESENTED

1. Whether the court of appeals properly dismissed petitioner's appeal as untimely because he failed to file a notice of appeal within thirty days after the date of entry of the judgment appealed from.

2. Whether the court of appeals violated petitioner's right to due process under the Fifth Amendment by dismissing his appeal.

LIST OF PARTIES

1. Mike Sexton, individually and as limited guardian of the separate estate of Julie Sexton, an incapacitated person
2. Pacific Mutual Life Insurance Company[1]
3. Lone Star Life Insurance Company

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[1] Pacific Mutual Life Insurance Company has no parent companies or subsidiaries (except wholly-owned subsidiaries).

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v.

LONE STAR LIFE INSURANCE COMPANY and PACIFIC MUTUAL INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT PACIFIC MUTUAL LIFE INSURANCE COMPANY

STATEMENT OF THE CASE

Petitioner Mike Sexton, individually and as limited guardian of the separate estate of Julie Sexton ("Sexton"), brought this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, to recover employee benefits from respondents Pacific Mutual Life Insurance Company ("Pacific Mutual")[2] and Lone Star Life Insurance

[2] The Petition for Writ of Certiorari incorrectly calls this respondent "Pacific Mutual Insurance Company."

Company ("Lone Star"). *App.* A-3 & A-4.[3] In the trial court, Sexton, Pacific Mutual, and Lone Star all moved for summary judgment. On June 21, 1989, the United States District Court for the Northern District of Texas, Judge David O. Belew, Jr., issued a memorandum opinion granting respondents' motions and denying Sexton's motion and a judgment in favor of Pacific Mutual and Lone Star. *App.* A-1 & A-2. The judgment was entered on the docket on June 25, 1989. *App.* A-1.

Evidently, through a clerical error, the district clerk did not serve notice of the entry of judgment when it was entered on the docket. Counsel for Sexton did not learn that judgment had been entered against their client until December 19, 1989, when a legal assistant in their office telephoned the court. *App.* B-4. This apparently was the first time Sexton's counsel had contacted the district court to inquire about the status of the case.

Sexton did not seek relief in the district court from the clerk's oversight. Instead, on January 11, 1990, he filed a notice of appeal from the judgment. *App.* B-1. On February 7, 1990, the United States Court of Appeals for the Fifth Circuit, on its own motion, dismissed the appeal as untimely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure. *App.* C-1. The Fifth Circuit denied Sexton's motion for rehearing on March 28, 1990. *App.* D-1.

SUMMARY OF THE ARGUMENT

Sexton argues that the court of appeals improperly dismissed his appeal as untimely and violated his right to due process in doing so. The action of the court of appeals was entirely proper, however, and the issues the petition raises in any event are not of particular import and do not divide the

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[3] References are to pages of the Appendix to the Petition for Writ of Certiorari.

courts of appeal. Sexton filed his notice of appeal long after the time for doing so expired because of his misplaced reliance on receiving timely notice of the entry of judgment from the district clerk. Sexton then compounded his error by failing to seek relief from the only court empowered to grant it to him, the district court. Sexton's bald assertion that the court of appeals deprived him of due process by dismissing his appeal pursuant to the federal rules likewise is meritless. Requiring a party to comply with the reasonable requirements of procedural rules is not a violation of due process.

ARGUMENT

This case presents no novel or important questions for the Court's consideration. The only issue the petition raises is whether the court of appeals properly dismissed Sexton's notice of appeal as untimely. A more straightforward and unremarkable issue is scarcely conceivable.

A. The Court of Appeals Properly Dismissed Sexton's Appeal Pursuant to the Plain Terms of the Federal Rules of Civil and Appellate Procedure.

A notice of appeal must "be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from." FED.R.APP.P. 4(a)(1). "A judgment . . . is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." FED.R.APP.P. 4(a)(6). The judgment against Sexton therefore was entered on June 25, 1989. He did not file his notice of appeal, however, until January 11, 1990, approximately six and one-half months later.

Sexton argues, albeit somewhat indirectly, that he timely filed his notice of appeal nevertheless because he filed it within thirty days after the date *he* received *notice* of the

entry of the judgment. The thirty-day period for appealing, however, runs from "the date of *entry* of judgment." FED.R.APP.P. 4(a)(1) (emphasis added). Moreover, "[l]ack of notice of the entry [of judgment] by the clerk does *not* affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed . . . ." FED.R.CIV.P. 77(d) (emphasis added). Indeed, Rule 77(d) was amended in 1946 precisely to foreclose the argument Sexton makes here. As the Advisory Committee Note explains:

> Rule 77(d) as amended makes it clear that *notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry.* Notification by the clerk is merely for the convenience of litigants.

FED.R.CIV.P. 77 advisory committee note (emphasis added). Sexton's contention that his notice of appeal was timely because it was filed within thirty days after he received notice of its entry therefore is absolutely irreconcilable with the plain meaning of the rules.

Sexton next complains that the court of appeals somehow erred in not construing his appeal as timely because of the clerk's failure to give him notice that the judgment had been entered. The short but definitive rebuttal to that contention is that the court of appeals had no power to grant Sexton such relief. The thirty-day period for filing a notice of appeal is mandatory and jurisdictional. *Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978). The court of appeals therefore was prohibited from extending that period. FED.R.APP.P. 2, 26(b).

It is not surprising, then, that Sexton identifies only one decision, *Buckeye Cellulose Corp. v. Braggs Electric Construc-*

tion Co., 569 F.2d 1036 (8th Cir. 1978), that he says reveals a conflict in the circuits on the question. A cursory review of *Buckeye*, however, reveals no such conflict. Indeed, *Buckeye* is distinguishable from this case on two fundamental grounds. Foremost, the party in that case sought relief from the *district court* pursuant to FED.R.CIV.P. 60(b)(6) for the clerk's failure to notify the parties of the entry of judgment. *Id.* at 1037. Of course, district courts, but *not* courts of appeal, are empowered to grant such relief under appropriate circumstances. In addition, in *Buckeye* the party called the clerk's office three times to inquire about the status of the case before judgment was entered and was assured that the parties would be notified promptly when the district court's decision was filed. *Id.* Sexton, on the other hand, evidently did not even inquire about the status of the case until over six months after judgment already had been entered against him. Thus, because Sexton's tardiness in appealing apparently was the result of his lack of diligence rather than some misrepresentation by the district clerk, and because relief under Rule 60(b)(6) is not warranted merely because of the clerk's failure to mail notice of the entry of judgment, *see Wilson v. Atwood Group*, 725 F.2d 255 (5th Cir.) (en banc), *cert. dismissed*, 468 U.S. 1222 (1984), Sexton probably would not have been able to demonstrate that he was entitled to relief even if he had sought it in the proper forum.

B. The Dismissal of Sexton's Appeal Did Not Deprive Him of Due Process.

Although Sexton's petition presents the question whether the Fifth Circuit's decision deprived him of due process of law, he does not cite any authority or offer any theory that would entitle him to relief under the Fifth Amendment's Due Process Clause. It is thus unclear whether Sexton claims that due process requires appellate review even where the adequacy of the trial court proceedings are not questioned, or

whether Sexton merely claims a due process right to notice of entry of judgment to preserve appellate review. In either case, principles of due process do not entitle Sexton to relief.

Although litigants have a due process right to a full and fair opportunity to present their claims, neither this Court nor any other ever has indicated that due process requires appellate review. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954); *McKane v. Durston*, 153 U.S. 684, 687 (1894); *In re Josephson*, 218 F.2d 174, 181 (1st Cir. 1954); *Ackermann v. United States*, 178 F.2d 983, 985 (5th Cir. 1949), *aff'd on other grounds*, 340 U.S. 193 (1950). As this Court noted in *Luckenbach Steamship Co. v. United States*, 272 U.S. 533, 536 (1926), "appellate review is not essential to due process of law, but is [a] matter of grace."

Granted, once a system of appellate review is established, access to it cannot be denied on a discriminatory basis. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 393 (1985); *Lindsey*, 405 U.S. at 77. This "right" to appeal, however, is subject to reasonable procedural requirements. *Cf. Arn v. Thomas*, 474 U.S. 140, 155 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982). One such requirement, that a notice of appeal be filed within thirty days of entry of judgment, is reflected in FED.R.APP.P. 4(a). Sexton does not allege that this time limitation violates due process. On the contrary, Rule 4(a) forwards the interest of judicial efficiency and fairness to litigants by preserving the finality of judgments. *See, e.g., Hall v. Community Mental Health Center*, 772 F.2d 42, 46 (3d Cir. 1985); *Fidelity & Deposit Co. v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, 748-49 (5th Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). Perhaps Sexton's unarticulated theory instead is that he has a due process right to rely absolutely on the clerk to notify him of entry of judgment in time to preserve appellate review.

If this is Sexton's view, no authority exists to support it. On the contrary, the plain meaning of Rule 77(d) and the cases construing it give ample notice that a party seeking to preserve his right to appeal may *not* rely on timely receiving notice of entry of judgment from the clerk. The advisory committee note to Rule 77(d) counsels that "[i]t would . . . be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment . . . ." FED.R.CIV.P. 77(d) advisory committee note. Similarly, the Fifth Circuit, sitting en banc, has warned litigants of "unwarranted reliance" on the clerk to provide timely notice, *Wilson*, 725 F.2d at 258, and reaffirmed its longstanding position that "the simple failure of the clerk to mail notice of the entry of judgment, without more, does not permit relief to a party who has failed to appeal within the prescribed time." *Id.* at 257; *see also Alaska Limestone Corp. v. Hodel*, 799 F.2d 1409, 1412 (9th Cir. 1986) (per curiam) (Rule 77(d) places "an independent duty [on parties] to keep informed . . . ."); *Hall*, 772 F.2d at 46 ("[T]he final sentence in Rule 77(d) . . . places the burden of monitoring the process of the case on the parties . . . ."). As the Fifth Circuit in *Fidelity & Deposit Co.* noted,

> [t]he rationale of the [1946] amendment [to Rule 77] was to enhance the finality of judgments by placing the entire burden of determining whether a judgment had been entered upon the parties. Under amended Rule 77(d), they could place no justifiable reliance upon the fact that no notice of entry of judgment had been received from the clerk, but rather they were obliged to inquire periodically of the clerk or of the district court to determine whether judgment had been entered. -

523 F.2d at 749. The placement of this obligation on litigants, who, after all, have invoked the aid of the courts in the first

instance, is patently reasonable and accords with due process.[4]

Even so warned of this duty, however, in appropriate circumstances litigants can obtain from the district courts extensions of the time in which to appeal. *See* FED.R.APP.P. 4(a)(5) ("The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed no later than 30 days after the expiration of the time prescribed by this Rule 4(a)."); FED.R.CIV.P. 60(b) ("On motion and upon such terms as are just, the [district] court may relieve a party . . . from a final judgment . . . ."). Sexton, however, did not seek relief from the district court. Thus, Sexton must maintain that due process requires not only that he be afforded relief from the time limitations of FED.R.APP.P. 4(a) and the mandate of FED.R.CIV.P. 77(d), but also that he receive that relief from the court of appeals.

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[4] In *Arn*, this Court upheld an analogous procedural rule against a due process challenge. The rule in *Arn*, promulgated under the Sixth Circuit's supervisory power, provided that the failure to file objections to a magistrate's report within ten days waived subsequent review in the court of appeals. In rejecting the due process claim, the Court wrote that

> [petitioner's statutory right of appeal] was not denied, however; it was merely conditioned upon the filing of a piece of paper. Petitioner was notified in unambiguous terms of the consequences of a failure to file, and deliberately failed to file nevertheless. We recently reiterated our longstanding maxim that "the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan*[,455 U.S. at 437]. The same rationale applies to the forfeiture of an appeal, and we believe that the Sixth Circuit's rule is reasonable.

Arn, 474 U.S. at 155.

Due process, however, does not require that appellate courts be empowered to waive appellate time limits. As noted above, this Court has interpreted Rule 4(a) to be "mandatory and jurisdictional." *Browder*, 434 U.S. at 264; *see also* FED.R.APP.P. 2, 26(b). The import of this construction, as the Fifth Circuit recognized below, is that whatever the equities of the particular situation may be, the courts of appeal are without authority to extend the time in which to appeal; any application for relief must be addressed to the district court. Indeed, because Sexton did not seek relief from the district court, the question of whether he would have been entitled to such relief as a matter of due process is not before this Court.

In essence, then, to uphold Sexton's due process claim, this Court would have to hold the following: (1) litigants and their counsel may ignore Rule 77(d)'s unambiguous mandate and rely entirely on the clerk to notify them of the entry of judgment; (2) the time limitations of Rule 4(a), which otherwise are mandatory and jurisdictional, must be waived where the clerk fails to provide timely notice, even if relief under FED.R.APP.P. 4(a)(5) and FED.R.CIV.P. 60(b) would be unavailable; and (3) in spite of FED.R.APP.P. 2 and 26(b), the courts of appeal must have the power to grant such relief where the litigant fails to seek it from the district court.

Due process does not require so much. The Federal Rules of Civil and Appellate Procedure and judicial decisions provided Sexton with ample notice that he could not rely entirely on the clerk timely to notify him of the entry of judgment and, if he wished to file a notice of appeal more than thirty days after the judgment was entered, that his only avenue for relief was the district court. Sexton failed to heed that notice and thus made not one but two mistakes: (1) he did not contact the district clerk to monitor the status of the case; and (2) when he discovered his error, he failed to seek

relief from the only court empowered to grant it. Although Sexton blames the district clerk for the tardiness of his appeal, then, his appeal was dismissed as untimely simply because he failed to understand or follow the Federal Rules. Thus, the petition raises no more of a due process issue than any other case dismissed on procedural grounds.

CONCLUSION

Sexton's petition for writ of certiorari is meritless. The Federal Rules of Civil and Appellate Procedure dictated the dismissal of his untimely appeal, and Sexton's assertion that the court of appeals' action denied him due process is utterly without foundation. Moreover, notwithstanding the merits, no reason exists for granting the petition. The decision of the court of appeals is not in conflict with any decision of any other court of appeals or this Court, and the petition does not otherwise implicate any important legal issues. Pacific Mutual

therefore respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

THOMPSON & KNIGHT

Original sig.
By: STEPHEN F. FINK

Stephen F. Fink
Counsel of Record
and
Steven W. Sloan
Elizabeth A. Schartz

3300 First City Center
1700 Pacific Avenue
Dallas, Texas 75201
(214) 969-1700

ATTORNEYS FOR
RESPONDENT
PACIFIC MUTUAL LIFE
INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 1990, all parties required to be served have been served with three true and correct copies of the foregoing Brief in Opposition of Respondent Pacific Mutual Life Insurance Company by mailing same first-class mail, postage prepaid, to their counsel of record:

Shirley Levin, Esq.
Counsel of Record for Petitioners
Kelley, Davis & Bates, A P.C.
6200 LBJ, Suite 240
Dallas, Texas 75240

William F. Peters, Jr., Esq.
Counsel for Respondent Lone Star
Life Insurance Company
McDonald, Sanders, Ginsburg, Newkirk,
Gibson & Webb
1300 Continental Plaza
Fort Worth, Texas 76102

Original Signed By
STEPHEN F. FINK

Stephen F. Fink